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Agreement for the appointment of Clerks of Works for construction projects in the National Health Service (1996 Edition) Amendment No 1 (1998)

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shall specify the duties affected and the reason for suspension or termination.

2.31 Suspension or termination by the client shall be permitted in the following circumstances:

a. the client has decided to suspend or terminate the scheme;

b. non-performance by the clerk of works;

c. breach of the provisions of this agreement by the clerk of works;

d. the clerk of works becoming bankrupt or insolvent.

Resumption of duties

2.32 If the clerk of works has not been given instructions to resume any work suspended under clauses 2.30 and 2.31a within six months from the date of suspension, the clerk of works may make a written request for such instructions, which must be given in writing. If these have not been received within 30 days of the date of such request, the clerk of works shall have the right to treat the appointment as terminated.

Suspension or termination by the clerk of works

2.33 The clerk of works may suspend or terminate the performance of the agreed duties on the expiry of reasonable notice given in writing to the client. In such notice the clerk of works shall specify the duties affected and the reason for suspension or termination.

2.34 Suspension or termination by the clerk of works shall be permitted in the following circumstances:

a. the client has not provided an instruction to resume work under clause 2.30;

b. breach of the provisions of this agreement by the client.

Death or incapacity of the clerk of works' key personnel

2.35 Should the clerk of works through death or incapacity be unable to perform the agreed duties, this agreement shall thereby be terminated.

Delivery of documents

2.36 On termination of the agreement and on satisfactory delivery of all documentation prepared by the clerk of works to the client, the clerk of works shall be paid all due fees and expenses.

Settlement of disputes

Adjudication

2.37 If a dispute arises under this agreement, either party may give notice at any time of his intention to refer the dispute to adjudication. Such a notice shall be served within 28 days of either party being made aware of the dispute. The notice will provide a timetable with the object of securing the appointment of the adjudicator and the dispute shall be referred to him within 7 days of such notice.

2.38 The notice shall specify the matter in dispute and set out the principal facts and arguments relating to it. Copies of all relevant documentation shall be attached to the notice.

2.39 The party to whom a copy of the notice required under clause 2.37 has been sent, shall send representations to the adjudicator within 14 days of his appointment.

2.40 The adjudicator shall act impartially. He may take such steps as he deems necessary to ascertain the facts relating to the dispute and the law. He shall reach his decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred. He may himself extend the period of 28 days by up to 14 days, with the consent of the party to whom the dispute was referred.

2.41 The decision of the adjudicator shall be binding until the dispute is finally determined in accordance with clause 2.47 or by agreement.

2.42 The adjudicator, his employee or agent shall not be liable to the parties for breach of anything done or omitted in the discharge or purported discharge of those functions as adjudicator unless the act or omission is in bad faith.

2.43 Payment of the adjudicator's fees shall be shared equally between the parties.

2.44 During the process of adjudication, the performance of the agreed duties shall continue as if there were no difference or dispute.

2.45 If the adjudicator named in article 6.9 of the memorandum of agreement resigns or is unable to act, the parties shall choose a new adjudicator jointly.

2.46 If the parties have not chosen a new adjudicator jointly within the 28 days of the adjudicator resigning or becoming unable to act, then the President of the Chartered Institute of Arbitrators shall be requested to nominate a new adjudicator.

Arbitration

2.47 If the following arises:

a. the adjudicator fails to provide his decision within the period specified in clause 2.40; or

b. the client and/or the clerk of works disagree with the decision of the adjudicator and the duties under the commission have been completed;

Extra work and expense

3.13 Where the clerk of works is involved in extra work and expense for reasons beyond the clerk of works' control and other than is provided for under clause 3.15 additional fees shall be due, and shall be an agreed lump sum or in accordance with the scale of charges as described in clause 3.5.

Payment for additional duties

Fees for additional duties required by the client

3.14 For additional duties not normally necessary such as those in connection with contractor's claims and all similar duties where the client specifically instructs the clerk of works in writing, the charges shall either be an agreed lump sum or in accordance with the scale of charges as described in clause 3.5.

Statutory fees

Payment of statutory fees

3.15 The client shall pay all fees in respect of applications under planning and other statutory requirements.

Suspension, resumption and termination

Fees on suspension or termination

3.16 On suspension or termination of the clerk of works appointment under clauses 2.31, 2.33 or 2.34 the clerk of works shall be entitled to fees due for all work completed at the date of suspension or termination.

Reimbursement during suspension

3.17 During any period of suspension the clerk of works shall be reimbursed by the client for costs necessarily incurred under the appointment up to the date of resumption or termination.

Fees on resumption

3.18 On resumption within six months of suspension, previous payments shall be regarded as payments on account towards the total fee. The fee may be adjusted as a result of negotiation between the project director and the clerk of works to allow for any cost increases or decreases that have occurred during the period of suspension. Any adjustment shall be an agreed lump sum together with an adjustment to the scale of charges as described in clause 3.8 .

Reimbursement on termination by the client

3.19 Where the clerk of works appointment is terminated by the client under clause 2.31, the consultant shall be reimbursed by the client for costs, excluding loss of profit, necessarily incurred in connection with work up to the date of termination or arising as a result of the termination.

Reimbursement on termination by the clerk of works

3.20 Where the clerk of works terminates the appointment under clause 2.34, the client shall be responsible for costs necessarily incurred by the clerk of works arising as a result of the termination.

Payment of accounts

Submission of accounts and documentary evidence

3.21 Accounts for payment of fees and/or expenses and disbursements shall be submitted to the client at the intervals stated in article 6.8 of the memorandum of agreement. Interim payments of fees shall be proportionate to the extent to which the commissioned duties have been discharged. Accounts for time-charge based duties and/or travelling, subsistence and other expenses shall be accompanied by documentary evidence of the time and expenses incurred. Such time charges and/or travelling, subsistence and other expenses shall be in respect of the whole of the period since the preceding interim payment.

Payment of accounts

3.22 All sums due from the client to the clerk of works under the agreement shall be paid within 30 days of submission by the clerk of works of his/her account to the project director.

3.23 Where the clerk of works sub-contracts any of the duties forming part of this agreement, there shall be included in the conditions of appointment of the sub-contractor a term which requires that payment be made to the sub-contractor within a period not exceeding 30 days from receipt of a fee account by the clerk of works from the sub-contractor.

3.24 Not later than 5 days after the date on which a payment becomes due, or would have become due if:

a. the other party had carried out his obligations under the contract; and

b. no set off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts;

the paying party shall specify the amount (if any) of the payment made or proposed to be made and the basis on which that amount was calculated.

3.25 No amounts shall be withheld for payment after the final date for payment of any sum due under this agreement unless notice of intention to withhold payment in accordance with clause 3.24 has been given. Such notice must be given not later than the period set out in clause 3.22.

3.26 If any sum due to the clerk of works is not paid in full by the final date for payment and no effective notice to withhold payment has been given, the clerk of works may (without prejudice to any other right or remedy) suspend performance of his obligations under this agreement, provided that 7 days notice so to do and setting out the grounds on which it is intended to suspend performance has been given.

3.27 The right to suspend performance in 3.25 and 3.26 above ceases when the client makes payment in full of the amount due.

3.28 Any period during which performance is suspended in pursuance of clauses 3.25 and 3.26 above shall be disregarded in computing for the purposes of any contractual time limit, the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.

Value Added Tax – in relation to fees and expenses

3.29 All fees and expenses set out in this agreement are exclusive of Value Added Tax, the amount of which, at the rate and in the manner prescribed by law, shall be paid by the client to the clerk of works.